82-1058

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals impermissibly intruded upon the exclusive constitutional authority of Congress to appropriate money when it ordered payment of $382 million in disputed claims out of funds appropriated for fiscal year 1981 that had already reverted to the Treasury, notwithstanding a 1982 appropriations measure enacted during the pendency of this litigation that prohibits payment of the claims "from this or any other appropriation."

PARTIES TO THE PROCEEDING

The petitioners are Richard S. Schweiker, Secretary of Health and Human Services, and the Department of Health and Human Services. The respondents are the States of Connecticut, Illinois, Maryland, Michigan, New Jersey, New York, Oklahoma, Pennsylvania, Wisconsin and California.

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The Solicitor General, on behalf of the Secretary of Health and Human Services and the Department of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-42a) is reported at 684 F.2d 979. The opinion of the district court (App. E, *infra*, 47a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982 (App. B, *infra*, 43a-44a), and a petition for rehearing was denied on September 22, 1982 (App. C, *infra*, 45a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 7 of the Constitution of the United States provides in relevant part:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *

2. Section 306 of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 530-531, 42 U.S.C (Supp. IV) 1320b-2 and 1320b-2 note, provides in relevant part:

> (a) Part A of title XI of the Social Security Act is amended by adding after section 1131 the following new section:
>
> PERIOD WITHIN WHICH CERTAIN CLAIMS MUST BE FILED
>
> SEC. 1132. (a) Notwithstanding any other provision of this Act (but subject to subsection (b)), any claim by a State for payment with respect to an expenditure made during any calendar quarter by the State—
>
> (1) in carrying out a State plan approved under title I, IV, V, X, XIV, XVI, XIX, or XX of this Act, or
>
> (2) under any other provision of this Act which provides (on an entitlement basis) for Federal financial participation in expenditures made under State plans or programs,
>
> shall be filed (in such form and manner as the Secretary shall by regulations prescribe) within the two-year period which begins on the first day of the calendar quarter immediately following such calendar quarter * * *.
>
> (b) The Secretary shall waive the requirement imposed under subsection (a) with respect to the filing of any claim if he determines (in accordance with regulations) that there was good cause for the failure by the State to file such

claim within the period prescribed under subsection (a). * * *

* * * * *

[(b)](3) In the case of such expenditures made in calendar quarters commencing prior to October 1, 1979, for which no claim has been filed on or before the date of enactment of this Act, payment shall not be made under this Act on account of any such expenditure unless claim therefor is filed (in such form and manner as the Secretary shall by regulation prescribe) prior to January 1, 1981.

* * * * *

(c) Notwithstanding any other provision of law, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically exempts such filing or payment from the provisions of this section.

3. The Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*, incorporated the following provision of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act of 1982, H.R. 4560, 97th Cong., 1st Sess. 38 (1981):[1]

Notwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act, no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred.

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[1] The procedural background of this provision is explained at page 10 note 7, *infra*.

STATEMENT

Respondents, ten states who are eligible for federal reimbursement of expenditures incurred in the administration of public assistance programs under certain titles of the Social Security Act, 42 U.S.C. (& Supp. IV) 301 *et seq.*, challenged the refusal of the Secretary of Health and Human Services (HHS) to reimburse them for various past expenditures. During the pendency of this litigation, Congress enacted an appropriations measure for fiscal year (FY) 1982 that prohibits payment of respondents' claims "from this or any other appropriation." Accordingly, the government contended that, whatever the merits of respondents' lawsuit at the time of filing, this subsequently enacted legislation prohibited the court of appeals from ordering payment of respondents' claims. Without explanation, the court of appeals held to the contrary and ordered the Secretary to pay respondents' claims, if otherwise properly allowable, out of any remaining unobligated FY 1981 funds. We seek this Court's review only on this so-called question of "relief." For the sake of completeness, however, we first describe the underlying merits litigation.

1. Prior to FY 1980, there was no time limit for the filing of state claims for reimbursement under various Social Security Act programs.[2] The absence of time lim-

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[2] These programs include Old Age Assistance, 42 U.S.C. 301 *et seq.*; Aid to Families with Dependent Children, 42 U.S.C. (& Supp. IV) 601 *et seq*; Child Welfare Services, 42 U.S.C. (& Supp. IV) 620 *et seq*; Work Incentive Program for Recipients of Aid Under State Plan Approved Under Part A, 42 U.S.C. (& Supp. IV) 630 *et seq.*; Child Support and Establishment of Paternity, 42 U.S.C. (& Supp. IV) 651 *et seq.*; Federal Payments for Foster Care and Adoption Assistance, 42 U.S.C. (Supp. IV) 670 *et seq.*; Aid to the Blind, 42 U.S.C. 1201 *et seq.*; Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351 *et seq.*; Aid to the Aged, Blind and Disabled, 42 U.S.C. 1381 note *et seq.*;

its had caused considerable budgetary uncertainty, to the consternation of congressional appropriations committees. See, *e.g.*, *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 126 (1979); H.R. Rep. No. 95-1746, 95th Cong., 2d Sess. 17 (1978); 125 Cong. Rec. S15128 (daily ed. Oct. 25, 1979). Accordingly, in the FY 1980 Departments of Labor-HEW[3] Appropriations Act, H.R. 4389, 96th Cong., 1st Sess. (1979), both Houses agreed to a provision that prohibited "payments from this appropriation to reimburse state or local expenditures made prior to September 30, 1978."[4] The bill passed the House of Representatives on August 2, 1979 (125 Cong. Rec. H7129-H7131 (daily ed. Aug. 2, 1979)), but it was never enacted into law because of a dispute over federal funding for abortions. Thus, there was no appropriations bill for HEW in FY 1980; instead, Congress enacted two continuing resolutions to fund HEW operations during that year. Act of Oct. 12, 1979, Pub.

"Medicaid," 42 U.S.C. (& Supp. IV) 1396 *et seq.*; and Social Services, 42 U.S.C. (1970 ed.) 1397 *et seq.*

[3] At the time this controversy first arose, administration of the programs at issue in this litigation was vested in the Department of Health, Education, and Welfare (HEW). Section 509 of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 695, redesignated HEW as the Department of Health and Human Services.

[4] Although this provision, on its face, appeared to prohibit the payment of any claims for expenditures made prior to September 30, 1978, the conference report shows that Congress only meant to prohibit payment of claims not filed within one year of the date of expenditure. H.R. Conf. Rep. No. 96–400, 96th Cong., 1st Sess. 18 (1979).

L. No. 96-86, 93 Stat. 656 *et seq.*; Act of Nov. 20, 1979, Pub. L. No. 96-123, 93 Stat. 923 *et seq.* These continuing resolutions incorporated by reference H.R. 4389's one-year time limit on the payment of retroactive claims by appropriating funds (Pub. L. No. 96-86, 93 Stat. 659; Pub. L. No. 96-123, 93 Stat. 925) (emphasis added):

> as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriation Act, 1980 (H.R. 4389), at a rate of operations, *and to the extent and in the manner*, provided for in such Act as adopted by the House of Representatives on August 2, 1979 * * *.

At the same time that Congress took up the question of time limits for state claims in the FY 1980 appropriations process, it was also considering substantive legislation to impose permanent time limits. This effort culminated in the passage, on June 17, 1980, of Section 306 of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 530. For the future, Section 306(a), 94 Stat. 530, provided that state claims have to be filed within two years of the expenditure. For so-called "prior-period" claims, Section 306(b), 94 Stat. 530, provided that there would be no time limit for the payment of claims for pre-October 1, 1979 expenditures if those claims had been filed prior to the date of enactment of Section 306, and that pre-October 1, 1979 expenditures not filed prior to Section 306's enactment had to be filed by January 1, 1981. The Secretary of HHS later extended this date, as allowed by Section 306(b), to May 15, 1981 (46 Fed. Reg. 3527 (1981)).

Because Congress intended Section 306 to be a permanent solution to the problem of setting time limits on the filing of state claims, it added the following subsection to Section 306 (Section 306(c), 94 Stat. 531):

> Notwithstanding any other provision of law, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically exempts such filing or payment from the provisions of this section.

Soon after passage of Section 306, however, Congress revived the one-year time limit contained in H.R. 4389. Having again failed to reach agreement on an appropriations bill, Congress enacted another continuing resolution to fund HHS operations during FY 1981. In the Act of Oct. 1, 1980, Pub. L. No. 96-369, 94 Stat. 1351 *et seq.*, Congress provided that the Secretary could spend FY 1981 funds only under "the conditions provided in" H.R. 4389 as passed by the House on August 2, 1979. As already noted, H.R. 4389 prohibited payment of state claims not filed within one year of the expenditure. During the course of FY 1981, two more continuing resolutions were passed with virtually identical provisions, including the incorporation by reference of H.R. 4389. Act of Dec. 16, 1980, Pub. L. No. 96-536, 94 Stat. 3166 *et seq.*; Supplemental Appropriations and Rescission Act of 1981, Pub. L. No. 97-12, Section 401, 95 Stat. 95.

2. This apparent clash between Section 306's time limits for filing claims and the one-year time limit of the FY 1981 appropriations resolutions led to the filing of this lawsuit. The Secretary took the position that the 1981 continuing appropriations resolutions were a restriction on the availability of appropriated funds and that he was therefore precluded from using FY 1981 funds to pay state claims filed more than one year after the date of expenditure. See 46 Fed. Reg. 23273 and 46135 (1981).

In their lawsuit, filed on September 15, 1981, the respondent states contested the Secretary's interpretation of the 1981 appropriations measures. They sought

a declaration that the 1981 appropriations resolutions did not prohibit payment of their claims for expenditures incurred prior to September 30, 1978, so long as those claims had been filed by May 15, 1981, as provided in Section 306.[5] Because of respondents' concern that all remaining HHS FY 1981 funds were due to revert to the Treasury at the close of the fiscal year on September 30, 1981 (see 31 U.S.C. 701(a)(2), amended and renumbered by Pub. L. No. 97-258, 96 Stat. 935, 31 U.S.C. 1552(a)(2)), respondents also sought a temporary restraining order and preliminary injunction directing the Secretary to set aside $382 million in 1981 funds and hold them available to pay the prior period claims (App. A, *infra*, 12a).[6]

The United States District Court for the District of Columbia approved an expedited schedule that brought respondents' motion for a preliminary injunction and the government's motion to dismiss the complaint for failure to state a claim before the court on September 28, 1981. Two days later, on the last day of fiscal year 1981, the district court granted the government's motion and dismissed the complaint (App. F, *infra*, 54a). The district court accepted the government's position that even though respondents' prior-period claims had been timely filed under Section 306, the Secretary

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[5] All of the claims in this litigation were filed prior to May 15, 1981, but none was filed within one year of the date of expenditure (see App. A, *infra*, 2a, 10a).

[6] The original complaint was filed by the State of Connecticut and six other states. These seven respondents sought an order directing the Secretary to set aside $196 million, which corresponded to the amount of their prior-period claims. Respondents subsequently amended the complaint to add two additional states as plaintiffs, and the district court granted the State of California leave to intervene. The $382 million figure includes the prior-period claims of the additional plaintiff states and the intervenor State of California (see App. A, *infra*, 1a-2a, 11a-12a n.13).

was prohibited by the 1981 continuing appropriations resolutions from using 1981 funds to pay prior-period claims that were filled with the Secretary more than one year after the date the underlying expenditures had been incurred (App. E, *infra*, 53a). The district court rejected as "untenable" the states' contention that Section 306(c) "was designed to control or limit all subsequent appropriations bills or that it controlled the continuing appropriations resolutions for FY 1981" (App. E, *infra*, 52a). The states had been unable to cite "one instance" where Congress had "set out to control yearly appropriations in an authorizing statute" (*ibid.*). The court stated that the 'absence of any precedent" for the states' position was "not surprising" (*ibid.*). It warned that acceptance of the states' position, that an authorizing statute such as Section 306 could prevent Congress from withholding appropriations to carry out its provisions, "would play havoc with the appropriations process and would drastically alter the legislative structure" (App. E, *infra*, 52a).

In summary, the district court concluded that the states' pending retroactive claims "were timely [filed] under Section 306," but that the Secretary "will be unable to pay them with FY 1981 appropriations" (App. E, *infra*, 53a). Recognizing that the court had no power "to compel Defendants to pay money that has not been appropriated by Congress," the court dismissed the complaint (*ibid.*).

3. Although the FY 1981 funds sought by respondents became unavailable at the close of that fiscal year, respondents nevertheless appealed the judgment of the district court. Between the time respondents and the government filed their respective appellate briefs, Congress enacted a continuing appropriations resolution for FY 1982, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*, which incorporated a provision barring payment of prior-period claims such as respondents' from "any"

appropriation. The provision, which explicitly overrode Section 306, stated:

> Notwithstanding section 306 * * * no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under [relevant titles] of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred.[7]

In its brief for the appellees, the government defended the decision of the district court on the merits and also argued that, in any event, enactment during the pendency of the appeal of Pub. L. No. 97-92, barring payment of respondents' claims from "any" appropriation, precluded the grant of relief to respondents (Br. for Appellees 66). In their reply brief, respondents did not explain what they thought "any" appropriation meant; they simply stated that "Public Law 97-92 only

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[7] This provision was contained in the 1982 appropriations act for HHS, which was passed by the House of Representatives on October 6, 1981. H.R. 4560, 97th Cong., 1st Sess. 38 (1981). See 127 Cong. Rec. H7097 (daily ed. Oct. 6, 1981). The Senate version of H.R. 4560, containing the identical provision, was reported by the Senate Appropriations Committee to the full Senate on November 9, 1981. H.R. 4560, 97th Cong., 1st Sess. 45-46 (1981). See 127 Cong. Rec. S13145 (daily ed. Nov. 9, 1981). As the court of appeals acknowledged (App. A, *infra*, 34a n.28), because H.R. 4560 was passed by the House and reported to the Senate, "the provisions of the bill were incorporated into the second continuing appropriations resolution for fiscal year 1982. Act of Dec. 15, 1981, Pub. L. No. 97-92, § 101(a)(1)-(3), 95 Stat. 1183 (1981)."

Although Pub. L. No. 97-92 was due to expire on March 31, 1982, Congress extended it for the balance of FY 1982. Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22. Congress has also acted to prohibit the payment of respondents' prior-period claims during FY 1983, see note 13, *infra*.

incorporates provisions of pending 1982 HHS appropriation bills to the extent necessary to govern 1982 spending in the absence of an enacted appropriation law * * *. It does not affect in any way the availability of funds appropriated in 1981" (Reply Br. of Nine Appellant States 20 n.*).

4. The court of appeals reversed the judgment of the district court (App. A, *infra*, 1a-42a). Reasoning that the issue in this case was not the availability of funds but rather "whether the claims were timely filed" (App. A, *infra*, 21a), the court held that the time limits established by Section 306 for the filing and payment of prior-period claims controlled over the more restrictive time limits established by the 1981 continuing appropriations resolutions, and that the Secretary was not prohibited by those 1981 resolutions from paying respondents' claims. Stated differently, the court of appeals held that even if the 1981 appropriations resolutions were read as incorporating the one-year time limit contained in H.R. 4389, that "incorporation was ineffective because it did not comply with section 306(c)" (App. A, *infra*, 34a).

The court of appeals also rejected, without explanation, the government's argument that enactment of Pub. L. No. 97-92 during the pendency of the appeal, barring payment of claims such as respondents' from "any" appropriation, precluded the grant of relief to respondents. In a brief footnote, the court of appeals stated only (App. A, *infra*, 41a n.36):

> We also reject the Government's argument that the words "any other appropriation" that were incorporated into Pub. L. No. 97-92, * * * have the effect of barring payment of the disputed claims from 1981 as well as 1982 appropriations. *See* Appellees' Brief at 66. [8]

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[8] In the text of its opinion the court of appeals contradictorily, and erroneously, stated that "neither side has argued that

Instead, relying on its decision in *Jacksonville Port Authority* v. *Adams*, 556 F.2d 52, 55-57 (D.C. Cir. 1977), the court of appeals ruled that it had equitable authority to compel the Secretary to pay respondents' claims from remaining 1981 funds that had reverted to the Treasury.[9] The court added that "'[o]ur authority under 28 U.S.C. § 2106 to fashion an appellate remedy in the interest of justice' * * * permits us to avoid" the "highly unjust result" that respondents "are no longer eligible for injunctive relief" (App. A, *infra*, 41a, quoting 556 F.2d at 57).[10]

REASONS FOR GRANTING THE PETITION

The court of appeals in this case committed an egregious ($382 million) and inexplicable error of constitutional dimension that only this Court can correct. In the name of equity, the court of appeals ordered the Secretary of HHS to pay respondents' claims from 1981 appropriated funds, in clear disregard of an Act of Congress that expressly prohibits payment of these claims from "any" appropriation. Article I, Section 9, Clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." It is settled that the courts may not use their equitable powers to compel a federal officer to pay money that Congress has refused to appropriate. *Reeside* v. *Walker*, 52 U.S. (11 How.) 271,

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Congress' action in the 1982 appropriations laws has any bearing on whether Congress precluded payment of those claims from the fiscal year 1981 appropriations" (App. A, *infra*, 40a). See Br. for Appellees 66.

[9] The court of appeals stated that there was "no question" that Pub. L. No. 97-92 barred payment of respondents' claims from 1982 funds (App. A, *infra*, 33a-34a, 40a-41a).

[10] The court of appeals remanded the case to the district court for the purpose of determining the extent of remaining unobligated 1981 funds (App. A, *infra*, 41a).

290-291 (1850). Because the court of appeals clearly violated this constitutional command, its judgment should be reversed.

1. Pub. L. No. 97-92 incorporates a provision mandating that "no payment shall be made from this or any other appropriation" to pay respondents' claims. The court of appeals correctly acknowledged that this provision bars payment of respondents' claims from FY 1982 funds (App. A, *infra*, 33a-34a, 40a-41a). Yet, at the same time, it held that this provision does not bar payment of respondents' claims from remaining unobligated 1981 funds that have reverted to the Treasury (*id.* at 41a n.36). In other words, the court of appeals gave force to the words "this * * * appropriation" but not to the words "or any other appropriation." The court gave no reason for its refusal to apply the words "or any other appropriation" to bar payment of respondents' claims from remaining unobligated 1981 funds, which is in "violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Congress plainly intended to prevent payment of respondents' claims from *any* existing funding source, not merely 1982 appropriated funds. As this Court has stated on numerous occasions, "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' * * * and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used * * *.'" *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 5, quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The language employed by Congress in Pub. L. No. 97-92 expressly bars payment of respondents' claims from "any" appropriation. The ordinary meaning of "any" is *any*, and we submit that "any" necessarily

includes remaining unobligated 1981 appropriations that have reverted to the Treasury. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) (emphasis in original; footnote omitted) ("the phrase[] 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action").[11]

2. There can be no question that the court of appeals was bound to apply Pub. L. No. 97-92 even though it was enacted during the pendency of respondents' appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969). Accord, *e.g.*, *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974).[12] The rule applies with special force here, in light of Chief Justice Marshall's admonition in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801), that "in great national concerns [as contrasted with 'mere private cases between individuals'] * * * the court must decide according to existing laws * * *." Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981).

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[11] The court of appeals decided that the 1981 continuing appropriations measures did not effectively override Section 306 because they did not mention it (App. A, *infra*, 34a). Although the government adheres to the position that payment of respondents' claims was barred by the 1981 appropriations measures, there can be no dispute that the 1982 appropriations measure, Pub. L. No. 97-92, effectively overrode Section 306, because it expressly applies "[n]otwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act." Because Pub. L. No. 97-92 is so clearly dispositive of this case, we do not ask this Court to review the underlying merits of the litigation.

[12] The court of appeals seemed reluctant to follow this well-settled rule because to do so "would, in practical effect, change our decision on the merits" (App. A, *infra*, 41a). That is, of course, the inevitable result of the rule requiring adherence to Congress' judgments.

In *Bradley*, the Court noted that only "manifest injustice" or statutory direction or legislative history to the contrary could justify a departure from this rule. *Bradley* v. *School Board*, *supra*, 416 U.S. at 711. The *Bradley* exceptions have no bearing on this case.

First, there is nothing in the language or legislative history of Pub. L. No. 97-92 that would justify deciding this case without reference to that statute. On the contrary, it is readily apparent that the only purpose of the incorporated provision in Pub. L. No. 97-92 was to prohibit payment of the very claims involved in this litigation out of 1982 "or any other" appropriations.[13]

Second, no manifest injustice results from applying Pub. L. No. 97-92 to this case. In *Bradley*, the Court identified three factors to consider in determining whether application of intervening legislation to a pending case might be unjust: (1) the nature and identity of the parties, (2) the nature of their rights, and (3) the nature of the impact of the change in the law on those rights. *Bradley* v. *School Board*, *supra*, 416 U.S. at 717. The Court in *Bradley* concluded that the public nature of the litigation distinguished that case from "'mere private cases between individuals,'" (*ibid*, quoting *United States* v. *The Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110), and found no injustice in subjecting a publicly funded governmental entity (a school board) to additional monetary liability. Here, too, the respondent states are governmental entities, engaged in litigation of national concern.

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[13] Under Section 306, the deadline for filing prior-period claims was May 15, 1981 (see page 6, *supra*). Thus, by the time Congress enacted Pub. L. No. 97-92 on December 15, 1981, prior-period claims could no longer be filed by the established deadline. That is why Pub. L. No. 97-92 refers to claims that "had been" filed. Therefore, the *only* prior-period claims that Congress could have had in mind when it enacted Pub. L. No. 97-92 were the claims involved in this litigation.

The Court in *Bradley* also stated that it would not apply an intervening legislative enactment when to do so would infringe upon rights that have matured or become unconditional. Because judgment in the district court was entered in favor of the federal government, and respondents had not secured a final judgment in their favor prior to the enactment of Pub. L. No. 97-92, respondents' "right" to reimbursement from remaining 1981 funds has never unconditionally matured. *McCullough* v. *Virginia*, 172 U.S. 102, 123-124 (1898). Equally important, this case does not require the Court to decide the substantive merits of respondents' claims to reimbursement for their past expenditures. Instead, the only issue that must be decided is whether the court of appeals could properly force the Secretary of HHS to pay the disputed claims over Congress' clear refusal to appropriate the necessary funds. There is, of course, no reason why Congress may not "consign [respondents' claims] to the fiscal limbo of an account due but not payable." *United States* v. *Will*, 449 U.S. 200, 224 (1981). Accordingly, the final prong of the *Bradley* test is not met here.[14]

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[14] It is noteworthy that for FY 1983 Congress again took up the question of payment of respondents' prior-period claims. It did so by enacting a continuing appropriations resolution that leaves the claims intact pending final disposition of this case, but defers payment, if any, until FY 1984. Act of Oct. 2, 1982, Pub. L. No. 97-276, Section 136, 96 Stat. 1197. The conference report on this version states (128 Cong. Rec. H8252 (daily ed. Sept. 30, 1982)):

> The language agreed to is not intended to prejudice the outcome of this court case either on behalf of the government or for the States. The position of the Congress on this issue has already been amply expressed through its action on the fiscal year 1980, 1981 and 1982 appropriations bills and related continuing resolutions. The amendment is, however, intended to prohibit payment of any of these claims during fiscal year 1983.

Notwithstanding the fact that this case fails to satisfy the *Bradley* criteria for "manifest injustice," the court of appeals invoked its decision in *Jacksonville Port Authority* v. *Adams*, 556 F.2d 52 (D.C. Cir. 1977), to hold that it had equitable power to prevent the lapse of budget authority in order to provide respondents with meaningful relief that would have been available had the district court entered judgment in their favor prior to the end of FY 1981. See also *National Association of Regional Councils* v. *Costle*, 564 F.2d 583 (D.C. Cir. 1977); *City of Los Angeles* v. *Adams*, 556 F.2d 40 (D.C. Cir. 1977); *National Association of Neighborhood Health Centers, Inc.* v. *Mathews*, 551 F.2d 321, 338-339 (D.C. Cir. 1976). These cases, even if correctly decided, are inapplicable here. As the court of appeals explained in *Jacksonville Port Authority* v. *Adams*, *supra*, 556 F.2d at 55-57, the doctrine there invoked is one of "equity and justice." But equity does not permit the courts to create budgetary authority that Congress has expressly denied. *Reeside* v. *Walker*, *supra*, 52 U.S. at 290-291; *Cummings* v. *Hardee*, 102 F.2d 622, 627-628 (D.C. Cir. 1939); *Cloutier* v. *Morgenthau*, 88 F.2d 846, 848 (D.C. Cir. 1937). Indeed, in *National Association of Regional Councils* v. *Costle*, *supra*, 564 F.2d at 589, the court of appeals itself recognized this limitation:

> Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities.

Accordingly, the court of appeals was bound to apply the incorporated provision in Pub. L. No. 97-92 to deny relief to respondents.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the error of the court of appeals is so apparent, the Court may wish to consider summary reversal.

Respectfully submitted.

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